

PROBLEMS AND IMPLICATIONS OF OUTLAWING AGGRESSIVE WAR:
AN EXAMINATION OF THE CHARTER RESULTING FROM THE
LONDON CONFERENCE, AUGUST 8, 1945

An abstract of a Thesis by
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The problem. The International Military Tribunal which tried Nazi Germany's leaders after the Second World War was predicated on the Allied nations' signing of the London Charter, which provided the law and procedures for the Nuremberg war-crime trials. The Charter is something of a landmark, both as a substantive code outlawing crimes against the international community and as an instrument establishing a procedure for prosecution and trial of such crimes before an international court. The focus of this paper will be on the category in the charter that deals with crimes against peace, which consist of conspiring to wage, initiating, or waging a war of aggression.

Procedure. Examination of relevant documents and written analyses, which are available in the Drake Cowles and Law School libraries.

Conclusions. At the London Conference aggressive warfare was declared to be an international crime. Whether the conferees were codifying a principle generally accepted internationally or creating ex post facto legislation remains a question of substantive process.

The principle of outlawing aggressive warfare was incorporated into the charter of the United Nations. It appears doubtful that the United Nations can enforce this principle based on the considerations that: the United Nations has been awarded weak coercive powers; the super-powers are regionally aligned and have established the practice of "collective self-defense" within their respective regions; any consensual definition of a nation-state is lacking, especially with regard to emerging nations; and, the nation-states or aspiring nation-states have the universally confirmed right to engage in wars of self-determination.

Overtime if world organization becomes functionally oriented, this may provide the key to reordering the nation-state system and, as a consequence rather than a declared goal, end aggressive warfare.

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Chapter 1

THE LONDON CONFERENCE AND PROBLEMS OF LEGAL PROCESS

Although the search for safeguards for the rights of men and nations began centuries ago, never before has success in this seeking been so imperative. Modern communications and transportation have brought men closer in their destinies. Apart from the potency of new weapons, this closeness would be less disturbing if the future were not so imperiled by the emergence of modern totalitarianism with its tendency to violate the rights of its citizens and of neighboring states.

Opponents of totalitarianism have tried to devise defenses against aggression and atrocities. Leaders have sought safeguards in several ways: politically, through collective security; militarily, through intimidating destructive might; and economically, through sanctions or elimination of frustrating poverty.

Another major effort to stop unjust wars and violations of human rights has been the development of an international legal code. Many hope that as individual states have curbed internal unrest and made men secure in their rights to life, liberty, and property, so the law of the nations might check international outlawry.

Perhaps the most striking illustration of this policy was the International Military Tribunal which tried Nazi

Germany's leaders after the Second World War. The court which judged Hitler's warlords was significant not only because of the defendants' rank and the depravity and magnitude of their crimes, but also because the Allies sought to create a new international law through the Tribunal's decisions.

The United States, through President Franklin D. Roosevelt, had joined in rather definite commitments to bring such men as the Nazis to justice. As early as August 21, 1942, the President stated to all mankind that "the time will come when they shall have to stand in courts of law in the very countries which they are now oppressing and answer for their acts."¹ About two weeks later Roosevelt repeated this promise. "It is our intention," he said, "that just and sure punishment shall be meted out to the ringleaders responsible for the organized murder of thousands of innocent persons and the commission of atrocities which have violated every tenet of the Christian faith."² Note, however, in these presidential proclamations there is no suggestion of an international tribunal. In fact, no treaty, precedent, or custom was offered to indicate by what method justice should be done.

¹Franklin D. Roosevelt, The Public Papers and Addresses of Franklin D. Roosevelt, The Year 1942, ed. Samuel I. Rosenman, Vol. XI (New York: Harper and Brothers, 1950), p. 330.

²Ibid., p. 410.

The first official declaration of policy by the American government came in a joint statement by the United States, Russia, and Great Britain which was released by the Moscow Foreign Ministers' Conference on November 1, 1943. The document issued a warning to the Axis powers that violators of the rules of war and humanity would be punished in the places where they perpetrated their atrocities. Major war criminals, however, because their outrages "have no particular geographical localization . . . will be punished by joint decision of the Governments of the Allies."¹ By January of 1945 this vague reference to a unified Allied trial was expanded and refined into a draft of a proposed agreement which the United States submitted to the Foreign Ministers of France, Great Britain, and the Union of Soviet Socialist Republics at the San Francisco United Nations Conference.² Following acceptance of the American program, representatives of the four nations met in London on June 26 to chart a common course of action with regard to a postwar

¹U. S. Dept. of State, Declaration of German Atrocities, U. S. Dept. of State Bulletin 9, November 6, 1943 (Washington, D.C.: U. S. Government Printing Office, 1944), p. 311.

²International Conference on Military Trials, London, "Preface," Report of Robert H. Jackson United States Representative to the International Conference on Military Trials, U. S. Dept. of State Publication 3080 (Washington, D.C.: U. S. Government Printing Office, 1949), p. v. Hereafter refer to as ICMT.

punishment program.

This task was concluded on August 8, 1945, when the four nations became signatories to the London Agreement. It was signed by Robert Falco for France, Sir William Allen Jowett for Great Britain, I. N. Nikitchenko and A. Trainin for the Soviet Union, and Robert H. Jackson for the United States.¹ This document consisted of seven articles, of which the first two embody the main thrust. Article I set forth the prescribed purpose of the Conference:

There shall be established after consultation with the Control Council for Germany an International Military Tribunal for the trial of war criminals whose offenses have no particular geographical location whether they be accused individually or in their capacity as members of organizations or groups or in both capacities.²

Article II provided that a Charter would be attached to the Agreement and that it would designate "the constitution, jurisdiction and functions of the International Military Tribunal. . . ."³

The Charter of the International Military Tribunal annexed to the Agreement of London was a rather longer document than the Agreement itself. Part I of this Charter dealt with the constitution of the Tribunal. Each signatory was to provide one member of the Tribunal and an alternate;

¹ICMT, p. 421.

²Ibid., p. 420.

³Ibid.

each signatory had to be represented by its member or alternate at every session; the members should choose one of themselves to be President; the President was to have a casting vote on all matters except convictions and sentences, for which an affirmative vote of at least three to one was required.

Part II of the Charter, headed "Jurisdiction and General Principles," laid down the categories of crime which the Tribunal was to consider, defined those crimes, and ruled out in advance the defence of superior orders. Part III of the Charter required each signatory to designate a Chief Prosecutor and constituted the four Chief Prosecutors a committee to apportion the work between themselves, settle the list of accused, prepare and present an indictment and submit suggested rules of procedure to the Tribunal.

Part IV of the Charter laid down certain provisions aimed at securing a fair trial for the defendants. Part V dealt with the powers of the Tribunal and the conduct of the trial; Part VI with judgment and sentence; and Part VII with incurred expenses of the Tribunal and the trials.

Any government of the United Nations, other than the signatories, could adhere to the Agreement and, in fact, nineteen did so. They were: Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, Panama, Paraguay, Poland, Uruguay, Venezuela, and Yugoslavia.¹

¹ICMT, "Preface," p. viii.

This resulted in twenty-three nations joining together to proceed against war criminals and to present a common indictment before a single Tribunal.

At bottom the setting up of the International Military Tribunal was not so great an innovation as has often been alleged. Each victor has had the right, long established and frequently exercised, of trying war criminals before an ad hoc military tribunal of its own creation. The innovation lay in the agreement of the several victors to try, at the same time, war criminals against whom all wished to bring charges. The result of setting up an international tribunal meant that each of the accused could be tried once only instead of a possible twenty-three times.¹

A major problem faced by the representatives of the four nations at the London Conference was to reconcile their conflicting views of legal concepts and traditions. Great Britain and the United States are known as common-law countries and exemplify the system of law peculiar to English-speaking peoples. On the other hand, France and the Soviet Union both use variations of what generally may be called the Continental system. It was to be expected that differences in origin, tradition, and philosophy among these legal systems would beget different approaches to the novel

¹Peter Calvocoressi, Nuremberg (New York: MacMillan, 1948), p. 17.

task of dealing with war criminals through the judicial process.

Throughout the proceedings of the Conference, there appeared to be early agreement and sustained consensus to secure for the defendants every reasonable opportunity to make a full and free defense. Thus the Charter gave the defendant the right to counsel, to present evidence, and to cross-examine prosecution witnesses. It required the indictment to include full particulars specifying the charges in detail, gave the defendant the right to make any explanation relevant to the charge against him and to have all proceedings conducted in, or translated into, his own language.¹

At least one of the procedural divergencies among the conferring nations worked to the advantage of defendants. The Anglo-American system gives a defendant the right, which the Continental system usually does not grant, to give evidence in his own behalf under oath. However, Continental procedure allows a defendant the right, not accorded by Anglo-American practice, to make a final unsworn statement to the tribunal at the conclusion of all testimony and after summation by lawyers for both sides, without subjecting himself to cross-examination. The Charter resolved these differences by giving defendants both privileges, permitting

¹ICMT, p. 426.

them not only to testify in their own defense but also to make a final statement to the court.¹

According to Robert Jackson, the United States' representative at the Conference, the fundamental cleavage during the negotiations concerned the function of a judiciary.

The Soviet views a court as one of the organs of government power, a weapon in the hands of the ruling class for the purpose of safeguarding its interests. It is not strange that those trained in that view should find it difficult to accept or to understand the Anglo-American idea of a court as an independent agency responsible only before the law.²

The Soviet philosophy of judicial function appears to have prevailed over the Anglo-American concept. This observation is predicated on the resolution of two procedural matters before the delegates: (1) the selection of justices, and (2) the rules of evidence.

The question of including justices from neutral or even enemy nations did not arise at the London Conference. Rather, it was assumed that there would be four justices at Nuremberg, one each from the nations of the Big Four. The London Conference did not consider whether nationality constituted a bias, although in the discussion of rules of conduct, Jackson indicated his expectation that the nationality of the justices might play a role. He said:

¹ICMT, p. 428.

²Ibid., "Preface," p. vi.

I suggest that a formula might be found which could be adequate to admonish judges who, after all, are nationals of our own countries and equally interested with ourselves in keeping the trials on the level that would not quite so brazenly invite accusations against us all.¹

The idea of having a trial before judges, some of whom would be drawn from neutral countries and/or one from Germany, had a certain attraction for those interested in the spirit of a "fair" trial.

A neutral judgment was thought by many to be fairer and more impartial than judgment by only the victorious nations but in this situation at bar consideration must be given to the whole concept of neutrality. Calvocoressi states that "impartiality is no longer an attribute of neutrality."² He maintains that a state can now only remain neutral if it is allowed to, and it makes little or no difference whether it wants to be neutral or feels neutral.

Explaining further, he writes:

In the second World War, Spain was at one point eager and ready to enter the fray; yet at the end she was classed as neutral. Holland on the other hand, and Norway would have been only too content with the status of neutrals; yet during the war they became belligerents.³

When neutrality is conditioned by good fortune and not by

¹ICMT, p. 102.

²Calvocoressi, p. 20.

³Ibid.

good feeling, it may cease to provide a useful touchstone for impartial judgment.

Appointing a German judge to the Tribunal might have added something to the value of the proceedings, but it would seem to be an arguable point. The condition in which Germany was found in 1945, with all powers and functions transferred from the then non-existent German government to the various occupation forces and no Peace Treaty signed or likely to be signed for a long time, it is not easy to see how a German judge could have been satisfactorily selected or by whom.

In spite of the difficulty, or even impossibility, of selecting neutral or German judges to serve on the Tribunal, nearly inexplicable from an American point of view was the ease with which the United States acquiesced in the removal of barriers to judicial bias following the statement at London of the Soviet delegate, I. T. Nikitchenko:

. . . with regard to the position of the judge the Soviet Delegation considers that there is no necessity in trials of this sort to accept the principle that the judge is a completely disinterested party with no previous knowledge of the case. [Nikitchenko had just said that the criminals 'have already been convicted.'] The case for the prosecution is undoubtedly known to the judge before the trial starts and there is, therefore, no necessity to create a sort of fiction that the judge is a disinterested person who has no legal knowledge of what has happened before.¹

¹Ibid., p. 105.

The results at Nuremberg were as follows: The Soviet Union appointed as its justice General Nikitchenko himself; the French Government appointed Professor Donnedieu de Vabres; the United States appointed former Attorney General Francis Biddle; and Great Britain appointed as justice and President of the Tribunal, Lord Justice Geoffrey Lawrence.¹ The appointment of justices only from among the aggrieved and victor nations themselves may not invalidate the Tribunal's judgment, but it raises serious questions about the Tribunal's impartiality.

Another feature of the Charter was its simplification of evidentiary requirements. The document provided that "The Tribunal shall not be bound by technical rules of evidence."² Technical rules of evidence have long been a landmark of Anglo-American systems as a part of their concept of a fair trial. Robert Jackson explained the waiving by the United States of this historical judicial requirement thusly:

The peculiar and technical rules of evidence developed under the common-law system of jury trials to prevent the jury from being influenced by improper evidence constitute a complex and artificial science to the minds of Continental lawyers, whose trials usually are conducted before judges and do not accord the jury the high place it occupies in our system. We saw no occasion at

¹Eugene Davidson, The Trial of the Germans (New York: Macmillan, 1966), p. 21.

²ICMT, p. 427.

the London Conference to insist upon jury rules for a trial where no jury would be used.¹

Concurrence with this opinion is evidenced and further clarified by the statement of the British representative at the London Conference, Sir David Maxwell Fyfe, who said the Tribunal can receive

. . . affidavits or statements for witnesses, depositions, recorded examinations before or findings of military or other tribunals, copies of official reports, publications and documents or other evidentiary materials and all such other evidence as is customarily received by international or military tribunals.²

This evidence included affidavits, diaries, and documents including sworn or unsworn statements. Affidavits offer two problems for jurists trained in the common law. First, the court has no control over the process in which lawyer and witness formulate an affidavit. Second, unless the witness takes the stand, the content of the affidavit is not subject to cross-examination.³ Diaries and unsworn documents pose even more serious problems. The selection of the justices and relaxation of the technical rules of evidence seemed to represent a move toward the Soviet concept of the judiciary where it serves as a weapon in the hands of the ruling class

¹ICMT, "Preface," p. xi.

²ICMT, p. 100.

³Richard Minear, Victor's Justice (Princeton: Princeton University Press, 1971), pp. 119-20.

(in this instance, the victors), rather than toward the Anglo-American concept of the judiciary, being independent and responsible only before the law.

One final procedural decision seems worthy of note. None of the punishments upon result of a conviction at the trials were subject to review by another court.¹ In the absence of a world-wide legal hierarchy, the fact that this was an "international" tribunal made the ruling pragmatic but did abuse the principle of Anglo-American law of a guaranteed appeal for every conviction.

It has often been thought that because of deep-rooted differences of procedure, the use of the judicial process by and among the community of nations is inherently limited. That these differences present grave difficulties in so adapting the judicial process, the record of the London Conference amply attests. That the Conference was able to reconcile these divergencies and prescribe on paper a procedure acceptable to all four nations is gratifying evidence that our fundamental concepts of fair procedure are not in hopeless conflict and can be compromised; but the price of the compromise has yet to be assessed.

¹ICMT, p. 428.

Chapter 2

PROBLEMS OF SUBSTANTIVE PROCESS:

AGGRESSIVE WAR WAS A CRIME

The Tribunal having been constituted, it is necessary to consider next what acts fell within its purview. They are contained in Article 6 of the Charter and divided into three broad categories: "(a) Crimes against Peace; (b) War Crimes; and (c) Crimes against Humanity."¹ There does not appear to be division among jurists and historians about the inclusion of the later two categories as charges in the indictment. George A. Finch states:

No substantial objection lies to the trial of such war crimes, to the judgment, or to the execution of the sentences. . . . It is accepted international law, conventional as well as customary, that a belligerent has authority to try and punish individuals for crimes which constitute violations of the laws and customs of war, as well as of the laws of humanity. . . .²

In 1947 Eugene Davidson wrote:

. . . the other two counts dealt with crimes both old and new. The charge of committing war

¹International Conference on Military Trials, London, Report of Robert H. Jackson United States Representative to the International Conference on Military Trials, U. S. Dept. of State Publication 3080 (Washington, D.C.: U. S. Government Printing Office, 1949), p. 423. Hereafter referred to as ICMT.

²George A. Finch, "The Nuremberg Trial and International Law," American Journal of International Law, LXII (January, 1947), 20-21.

crimes had its roots in centuries of warfare. . . .
but the charges of planning and waging aggressive
warfare, made its first appearance at Nuremberg.¹

Thus, the Charter declared that aggressive war was a crime. This principle of international law, created at London, may become in the future more important than any other point raised by the trial and will be treated in detail.

The framers of the Charter did not set out to legislate or to create law; they aimed at setting down for the first time on paper a statement of the law as it existed in the nineteen thirties.² This is a very usual thing to do, for law comes into being in two different ways and derives its force from two different sources. In the first place, law may be created by an instrument, the decree of a King or the act of a parliament, which lays down new rules or alters old ones. In international law there are no such legislative instruments, and the Charter of the International Military Tribunal was not an instrument of this kind.

The second source from which law is built up is custom. The Common Law of England, for instance, consists of the customs and practices of immemorial usage, and this sort of law is not to be sought in the first place in written

¹Eugene Davidson, The Nuremberg Fallacy (New York: Macmillan, 1973), pp. 1-2.

²Peter Calvocoressi, Nuremberg (New York: Macmillan, 1948), p. 32.

instruments, nor does it depend on written instruments for its validity. This kind of law grows gradually, and, at a certain point, it generally becomes convenient to reduce it to writing and to publish the writing by decree or by Act of Parliament. Thereafter, the enactment serves as evidence of the existence and content of the law, but no such enactment is needed to make it law. The main difference created by the enactment is that, whereas afterwards the existence and meaning of the law can be seen by referring to the Act, before the enactment these things have to be proved in different ways; and a court would have to look for other evidence in order to satisfy itself that the alleged customs were generally accepted as law. It is well settled that international law, as well as state law, includes custom.¹

The Charter of the International Military Tribunal purported to reduce existing customs, having the force of law, to writing. Of course the framers of such an instrument may be wrong. It is always arguable that a particular custom was not sufficiently clear or well established to have the force of law or that the custom has been misunderstood or inadequately expressed in the enactment. If an enactment errs in any such respect, then it is no longer declaring law but making it--and possibly making bad law at that. The question therefore becomes this: Did the writing

¹Ibid., p. 32.

[In this case the Charter, Article 6, paragraph (a)] correctly express the customs which had already acquired the force of law, and what is the evidence of this custom and conviction?

Legalists like Sheldon Glueck and Joseph B. Keenan, who support the position that such a widespread custom had indeed developed, base their judgment on historical international pronouncements such as:

(1) The agreements limiting the nature of the deeds permissible in the extreme event of war, that is, the Hague Conventions of 1899 and 1907 and the Geneva Conventions of 1929, regulate the treatment of prisoners of war and ameliorate the condition of wounded and ill soldiers. Germany and Japan had ratified (with reservations) the 1907 Hague Convention; Italy the 1899 one. Germany and Italy had ratified the Geneva Convention respecting prisoners of war. When the government of the United States expressed its intention to observe that Convention as to both prisoners of war and civilian internees during World War II, Japan agreed to do likewise. The Hague and Geneva Conventions, to be sure, took for granted the legality of war; but, from motives both of humanitarianism and mutual prudence, they went so far in the direction of limiting the methods of opening hostilities [Hague Convention, 1907] and conducting war as to be "signposts on the road toward a growing conviction that aggressive

war must somehow be abolished."¹

(2) The draft of a treaty of mutual assistance sponsored by the League of Nations in 1923 stated (Article I) "that aggressive war is an international crime," and that the Parties would "undertake that no one of them will be guilty of its commission."² About one-half of the twenty-nine states which replied to a submission of the draft treaty wrote in favor of accepting the text. A major objection was that it would be difficult to define what act would compromise "aggression," rather than doubt as to the criminalism of aggressive war.³ The United States was unable to adhere to the draft because it was not a member of the League.

(3) The preamble to the League of Nations' 1924 Protocol for the Pacific Settlement of International Disputes ("Geneva Protocol"), after "recognizing the solidarity of the members of the international community," asserted that "a war of aggression constitutes a violation of this solidarity and an international crime." It went on to say that the contracting parties were "desirous of facilitating the complete application of the system provided in the

¹Sheldon Glueck, The Nuremberg Trial and Aggressive War (New York: Knopf, 1959), p. 27.

²F. P. Walters, A History of the League of Nations (London: Oxford University Press, 1952), p. 226.

³Glueck, p. 29.

Covenant of the League of Nations for the pacific settlement of disputes between the States and of ensuring the repression of international crimes.¹ The Geneva Protocol was recommended to the Members of the League of Nations by a resolution unanimously passed in the Assembly by the vote of forty-five Members of the League (including Italy and Japan--Germany was not as yet a Member), and signed by the representatives of many countries. Not only did it definitely declare aggressive war to be an international crime, but by Article 6 it provided that the sanctions of Article 16 of the Covenant of the League should be applicable to a state resorting to war in disregard of its undertakings under the Protocol. Although it never legally came into force (not, however, because of any serious doubt that a war of aggression could be regarded as an international crime),² the historic Protocol of Geneva did express the strong attitude of many leading jurists and statesmen regarding both the illegality and the criminalism of aggressive war.

(4) Article 1 of the Draft Treaty of Disarmament and Security Prepared by an American Group and considered by the Third Committee (on disarmament) of the Assembly of the League of Nations, 1924, provides that "The High Contracting Parties solemnly declare that aggressive war is an international crime," and "severally undertake not to be guilty of

¹Ibid.

²Ibid., p. 30.

its commission," while Article 2 provides that "A State engaging in war for other than purposes of defence commits the international crime described in Article 1."¹

(5) An expression of American opinion on aggressive war was made on December 12, 1927, when Senator William E. Borah introduced a resolution, the last in a long series since 1922, of which a pertinent provision was:

. . . that it is the view of the Senate of the United States that war between nations should be outlawed as an institution or means of the settlement of international controversies by² making it a public crime under the law of nations.

(6) At the eighteenth plenary meeting of the Assembly of the League of Nations, September 24, 1927, all the delegations (including the German, Italian, and Japanese) having pronounced in favor of a Resolution of the Third Committee comprising a Declaration Concerning Wars of Aggression, the Declaration was declared to be unanimously adopted.³ The preamble to the Declaration states:

The Assembly,
Recognizing the solidarity which unites the community of nations;
Being inspired by a firm desire for the maintenance of general peace;
Being convinced that a war of aggression can never serve as a means of settling international disputes⁴
and is, in consequence, an international crime. . . .

¹Glueck, p. 33.

²Ibid.

³Ibid., p. 30.

⁴Ibid., p. 31.

(7) The unanimous Resolution (February 18, 1928) of the twenty-one American Republics at the Sixth (Havana) Pan-American Conference declared that "war of aggression constitutes an international crime against the human species."¹

(8) At the International Conference of American States on Conciliation and Arbitration, assembled in Washington in December, 1928, representatives of all twenty republics at the Conference signed a General Convention of Inter-American Conciliation, of which the preamble contains the statement, "desiring to demonstrate that the condemnation of war as an instrument of national policy in their mutual relations" set forth in the Havana Resolution, "constitutes one of the fundamental bases of inter-American relations. . . ."²

(9) The Pact of Paris, or the Briand-Kellogg Pact, named after the two ministers of foreign affairs who drafted it, was signed in Paris on August 27, 1928. The treaty entered into force on July 24, 1929, with forty-six States depositing ratifications or instruments of adhesion and sixteen more then signifying their intention to adhere to the treaty.³

¹Ibid.

²Bulletin of the Pan American Union, LXIII, December, 1929 (Washington, D.C.: U. S. Government Printing Office, 1930), 114.

³Glueck, p. 17.

The first two articles of the Pact read thusly:

Article I. The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

Article II. The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them,¹ shall never be sought except by pacific means.

This Pact, however, failed to make violations of its terms international crimes punishable either by an international tribunal or by national courts. But, some interpreted the treaty as containing broad future implications. United States' Senator Arthur Capper, commenting on his resolution favoring the efforts of Briand, said:

There is every reason to consider this proposal for civilized nations to renounce war as an instrument of public policy, a logical and necessary step toward peace. It goes farther, it seems to me, than merely declaring war criminal.²

(10) Finally, the Anti-War Treaty of Non-Aggression and Conciliation signed at Rio de Janeiro, October 10, 1933, was ratified by twenty-five States, including the United States of America. The preamble to that treaty states that

¹Samuel F. Bemis, A Diplomatic History of the United States (New York: Holt Rinehart and Winston, 1965), p. 725.

²James T. Shotwell, War as an Instrument of National Policy (New York: Harcourt Brace, 1929), p. 97.

the Parties were entering into the agreement "to the end of condemning wars of aggression and territorial acquisitions that may be obtained by armed conquest, making them impossible and establishing their invalidity."¹

The above international pronouncements constituted for some a recognition that aggressive war was a crime; however, prior to and during the London Conference, serious doubt about the issue was evident.

¹Glueck, p. 32.

Chapter 3

PROBLEMS OF SUBSTANTIVE PROCESS:

AGGRESSIVE WAR WAS NOT A CRIME

The unsettled state of international law was a controversial aspect of the Nuremberg Trials. The Allies wished to prosecute their German enemies not simply for conventional war crimes, but also for "crimes against peace," a criminal category of highly uncertain status in international law. If the prosecution wished to protect itself from the charge of ex post facto legislation, it had to argue that international conventions such as the Pact of Paris had established certain acts as crimes, or that certain acts were recognized as crimes by "all civilized nations," or that the designation of these acts as criminal was a natural and logical extension of existing principles of international law. This position was presented in the preceding chapter. The argument that the representatives at the London Conference initiated new principles of international law, rather than codifying existing customs, will be examined next.

Is conspiring to or waging an aggressive war a crime at international law? In its aide-memoire of April 23, 1945, the British government admitted serious doubt with regard to this question:

Reference has been made to Hitler's conduct leading up to the war as one of the crimes on which the Allies should rely. There should be included in this the unprovoked attacks which, since the original declaration of war, he has made on various countries. These are not war crimes in the ordinary sense, nor is it at all clear that they can properly be described as crimes under international law.¹

At the London Conference the French delegation expressed grave concern about affirming that aggressive war was indeed illegal at that time.

We do not consider as a criminal violation the launching of a war of aggression. If we declare war a criminal act of individuals, we are going farther than the actual law. We think that in the next years any state which will launch a war of aggression will bear criminal responsibility, morally and politically; but on the basis of international law as it stands today, we do not believe these conclusions are right. . . . We do not want criticism in later years of punishing something that was not actually criminal, such as launching a war of aggression.²

During the discussions at London leading up to the Agreement, establishing the criminality of aggressive war, as apart from conventional war crimes committed in the course of war, was important primarily to the American side.³

¹International Conference on Military Trials, London, Report of Robert H. Jackson United States Representative to the International Conference on Military Trials, U. S. Dept. of State Publication 3080 (Washington, D.C.: U. S. Government Printing Office, 1949), pp. 383-84. Hereafter referred to as ICMT.

²Ibid., p. 295.

³Richard H. Minear, Victors' Justice (Princeton: Princeton University Press, 1971), p. 47.

Robert Jackson, the United States representative argued:

Germany did not attack or invade the United States in violation of any treaty with us. The thing that led us to take sides in this war was that we regarded Germany's resort to war as illegal from its outset, as an illegitimate attack on the international peace and order. And throughout the efforts to extend aid to the peoples that were under attack, the justification was made by the Secretary of State, by the Secretary of War, Mr. Stimson, by myself as Attorney General, that this war was illegal from the outset and hence we were not doing an illegal thing in extending aid to people who were unjustly and unlawfully attacked. No one excuses Germany for launching a war of aggression because she had grievance, for we do not intend entering into a trial of whether she had grievances. If she had real grievances, an attack on the peace of the world was not her remedy. Now we come to the end and have crushed her aggression, and we do want to show that this war was an illegal plan of aggression.¹

The United States lacked the traditional justification for going to war, that of defense; and yet the United States had joined the fight against Germany. The position of the United States toward the principle of self-defense had been clearly set forth by former Secretary of State Frank B. Kellogg. Speaking for the American intent as a party to the Pact of Paris he said:

The right of self-defense is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to

¹ICMT, pp. 383-84.

decide whether circumstances require recourse to war in self-defense.¹

Testifying before the Senate Committee on Foreign Relations, Kellogg was even more categorical:

I knew that this government, at least, would never agree to submit to any tribunal the question of self-defense, and I do not think any of them [the other governments] would.²

That Senate committee reported the Paris Pact to the United States in the following unequivocal terms:

The committee reports the treaty with the understanding that the right of self-defense is in no way curtailed or impaired by the terms or conditions of the treaty. Each nation is free at all times and regardless of the treaty provisions to defend itself, and is the sole judge of what constitutes the right of self-defense and the necessity and extent of the same. The United States regards the Monroe Doctrine as a part of its national security and defense.³

Since the United States did not enter World War II in an act of self-defense, but rather to "aid peoples under attack," Jackson's argument that the Germans waged an aggressive war may have constituted a request for international approval of

¹U. S. Dept. of State, Treaty for the Renunciation of War, 1928 (Washington, D.C.: U. S. Government Printing Office, 1933), pp. 57-59.

²U. S. Congress, Senate. Committee on Foreign Relations, General Pact for the Renunciation of War, Hearing, 70th Cong., 2d Sess., December 7, 1928 (Washington, D.C.: U.S. Government Printing Office, 1929), p. 4.

³U. S., Congressional Record, 70th Cong., 2d Sess. (1929), LXX, No. 11, 1,730.

American policy.

In Article VI of the Charter, participation in a common plan or conspiracy to wage a war of aggression was declared to be criminal.¹ The question arises: Why should the Allies have charged conspiracy, rather than simply the commission of the various crimes alleged? From the legal point of view, the net of conspiracy could be as wide as the prosecution wished to make it. Also, the establishment of such conspiracy at the major trial at Nuremberg would have greatly facilitated the prosecution of lesser enemy figures at later trials.² If the existence of the conspiracy were established at the first trial, later tribunals could take judicial notice of that fact and concentrate solely on the issue of the involvement of later defendants in that conspiracy. The major trial at Nuremberg, in fact, was followed by other trials.

Between the autumn of 1945 and March, 1948, about 1,000 cases involving some 3,500 persons were tried in many countries on the Continent before Allied courts, although the United Nations War Crimes Commission had compiled a list of 36,800 names of men who were either to be held as material witnesses or against whom it was considered likely a case could be made . . . In the United States courts in Nuremberg, in the period from July, 1945, until July, 1949, 199 people were tried. . . .³

¹ICMT, p. 423.

²Eugene Davidson, The Trial of the Germans (New York: Macmillan, 1966), pp. 28-29.

³Minear, p. 38.

Is conspiracy, as opposed to the actual commission of an act, a crime in international law? This question arose at the London Conference, and one of the nations involved responded negatively to it. The British representative said, "We have a conception of conspiracy in our law and would like to know whether you have it too." In response, the French delegate replied, "No, we do not have that conception of conspiracy. We would have to make new law."¹

Prior to the Conference, Francis B. Sayre wrote this concerning conspiracy:

It is a doctrine as anomalous and provincial as it is unhappy in its results. It is utterly unknown to the Roman law; it is not found in modern Continental codes; few Continental lawyers ever heard of it.²

Not only is it peculiar to English law, continued Sayre, but it is also dangerous.

Under such a principle everyone who acts in cooperation with another may some day find his liberty dependent upon the innate prejudices or social bias of an unknown judge. It is the very antithesis of justice according to law.³

Although the American government urged at the London Conference that aggressive war was a crime, only one year earlier the Americans had concurred with others that it was

¹ICMT, p. 296.

²Francis B. Sayre, "Criminal Conspiracy," Harvard Law Review, XXXV (1922), 427.

³Ibid., 413.

not a crime. The legal committee of the United Nation's War Crimes Commission had discussed the issue in 1944, concluding that aggression was a crime; but the Commission itself had not adopted this position, "the feeling prevailing that the Governments would be reluctant to go so far."¹ Instead, the matter was referred to a subcommittee of four, representatives of Great Britain, Czechoslovakia, the Netherlands, and the United States. Of these four, only Czechoslovakia dissented from the majority report which held that:

Acts committed by individuals merely for the purpose of preparing for and launching aggressive war, are . . . not 'war crimes.' However, such acts and especially the acts and outrages against the principles of the laws of nations and against international good faith perpetrated by the responsible leaders of the Axis powers and their satellites in preparing and launching this war are of such gravity that they should be made the subject of a formal condemnation in the peace treaties. It is desirable that for the future penal sanctions should be provided for such grave outrages against the elementary principles of international law.²

This report and the Czech dissent were the subject of discussion on the part of the whole Commission.

Though the representatives of Australia, China, New Zealand, Poland, and Yugoslavia supported the Czech position, the United States did not, nor did France, Great Britain, the Netherlands and Greece. The matter was left to be referred

¹United Nations War Crimes Commission, History of the United Nations War Crimes Commission (London: Her Majesty's Stationery Office, 1948), p. 181.

²Ibid., pp. 182, 184-85.

to the member nations for instructions, but no resolution was ever adopted. Only one year before the London Conference, three of the four participating nations at the Conference had agreed that aggressive war was not in itself a crime.

A corollary to the question of the criminality of aggressive war is the question, Can aggression be defined? The Pact of Paris had not tried to define aggression. The Allies at the London Conference did try, but with little success. The American attempt at London to define aggression was designed to limit the scope of the trial. As Robert H. Jackson stated:

There is a very real danger of this trial being used . . . for propaganda purposes. . . . It seems to me that the chief way in which the Germans can use this forum as a means of disseminating propaganda is by accusing other countries of various acts which they will say led them to make war defensively. That would be ruled out of this case if we could find and adopt proper language which would define what we mean when we charge a war of aggression.¹

The United States suggested the following definition: "An aggressor . . . is that state which is first to declare war, to invade another state, to form a naval blockade, or to provide support for insurgent groups."² Here Jackson placed heavy emphasis on chronological priority. The definition concluded:

¹ICMT, p. 273.

²Ibid., p. 294.

No political, military, economic, or other considerations shall serve as an excuse or justification for such actions; but exercise of the right of legitimate self-defense, that is to say, resistance to an act of aggression, or action to assist a state which has been subjected to aggression, shall not constitute a war of aggression.¹

For Jackson the essential criminal element was the use of force; domination by peaceful means was wholly legal. When was resort to force not illegal? In two cases: self-defense and assistance against aggression. Self-defense was not new or controversial; but the same could not be said about assistance against aggression. It had not been included in the Pact of Paris; it had not been mentioned in 1944 when the United Nations War Crimes Commission discussed aggression; but it had an obvious and compelling logic: It justified the actions of two of the four nations at the Conference--the United States in its declaration of war on Germany and the Soviet Union in its declaration of war on Japan--which were otherwise of dubious "character" in terms of international law.

The Russian delegate at the London Conference, General I. T. Nikitchenko, felt that definition of the term aggression was unnecessary. He said:

The policy which has been carried out by the Axis powers has been defined as an aggressive policy in the various documents of the Allied nations and of all the United Nations, and the tribunal would really not need to go into that. . . .

¹Ibid.

The fact that the Nazi leaders are criminals has already been established. The task of the tribunal is only to determine the measure of guilt of each particular person and mete out the necessary punishment--the sentences.¹

The only definition acceptable to the Russians would have specified that aggression was something Nazi Germany had committed. Because of this disagreement and because the French insisted that defining crimes was beyond the jurisdiction of the London Conference, the Charter included no definition of aggression.

A cardinal principle of United States domestic criminal law is that there shall be no retroactive legislation. This principle, contained in Article I of the American constitution, is sometimes expressed in the Latin phrase:

nullum crimen sine lege, nulla poena sine lege (unless there is a law, there can be no crime; unless there is a law, there can be no punishment).² According to this prohibition an act that was not criminal at the time of commission could not be reached by retroactive legislation. To be sure, in countries with common-law traditions, there has always been some degree of retroactivity, at least in judicial legislation: Law is made case by case, determined by the judge.

However, to the extent that the law of the Nuremberg Trials was made not at Nuremberg but in London, it is not a case of judicial legislation analogous to the role of judges in the

¹ICMT, p. 303.

²Minear, p. 60.

development of the common law. The conferees at London were not judges (although the Soviet representative became a Nuremberg judge and the French representative the alternate French judge); they were, instead, official representatives of their governments.

At the London Conference, Robert H. Jackson argued that defining the law was within the jurisdiction of the Conference. He stated: "Our basic purpose is that Article 6 listing the crimes to come under the jurisdiction of the tribunal should settle what the law is for the purposes of this trial and end the argument. . . ." ¹ If the crimes were not defined in the Charter, thought Jackson, the tribunal might well find the accused guilty of the acts but hold that the acts themselves were not crimes. Said Jackson: "That, we think, would make the trial a travesty." ²

The French delegate quickly took Jackson to task. He declared:

. . . there is a difference in saying that, if they are convicted in . . . those criminal acts, they will be dealt with as major war criminals, and declaring those acts as criminal violations of international law, which is shocking. It [declaring those acts to be criminal violations] is a creation by four people who are just four individuals--defined by those four people as criminal violations of international law. Those acts have been known for years before and have not been declared criminal violations of international law. It is ex post facto legislation . . . It is declaring as settled something discussed for years and settling a question

¹ICMT, p. 329.

²Ibid., p. 330.

as if we were a codification commission.¹

In spite of the French objection, the Nuremberg Charter in its final form read:

The following acts shall be deemed criminal violations of international law, and the Tribunal shall have power and jurisdiction to convict any person who committed any of them on the part of the European Axis countries . . .

(a) Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.²

¹ICMT, p. 335.

²Ibid., p. 423.

Chapter 4

THE NATION-STATE CONCEPT: STATUS OF AND IMPLICATION FOR A WORLD UNION

In November, 1947, the Assembly of the United Nations unanimously adopted a resolution that the Nuremberg principles would be used by its International Law Commission as the basis for formulating the new codes of international law.¹ It was hoped, then, that through the United Nations organization the decisions of France, the Soviet Union, Great Britain and the United States made at London in 1945 to outlaw aggressive war could be put into effect.

In the twentieth century the creation of a world union implies two major conditions: (1) a joining together of nation-states; and, (2) an agreement of those nation-states to release part of their sovereignty in order to act collectively.

From a historical perspective, the concept of world unity is not new. Peter Calvocoressi states that during the last few centuries of the Middle Ages, Western Civilization acknowledged certain universal claims and values: the Church and Eternal Law.² The dominion of the Catholic

¹Eugene Davidson, The Nuremberg Fallacy (New York: Macmillan, 1973), p. 3.

²Peter Calvocoressi, Nuremberg (New York: Macmillan, 1948), p. 126.

Church had its limits, since the Empire also maintained universal claims in its own sphere; but those claims did not affect the universality of the Church's dominion even if they prevented it from being a sole universality. The men of Western Civilization all owed an allegiance to the Church without distinction of race or tongue or habitat. During the Middle Ages, it was believed that there existed an Eternal Law above the laws prevailing in different regions. These laws were human and fallible attempts to divine and reproduce the infallible Law. The laws made by kings might be wrong; but the Law was never wrong, and kings were as much beneath it as anyone else. A king who mistook or transgressed the Eternal Law forfeited his royal rights. When Western Civilization emerged from the Renaissance and Reformation, it was without a universal Church and without universal Law.¹ Instead, there were sovereign states, absolute monarchs, and the divine right of kings.

The king was no longer beneath the Law in the mediaeval sense. He might have to share his supreme law-making powers (e.g., with a Parliament), but the new check was national just as the king himself was national. There was no check above the state; there was nothing to limit the assertiveness of the national sovereign state or the leaders of such a state. The result was that the crescendo of

¹Ibid.

discordant claims and ambitions proved soluble only by war.

The concept that the world community should be organized on the basis of separate, sovereign nation-states had its first impetus out of the settlement of World War I and the establishment of the League of Nations; and it was further intensified by World War II and the creation of the United Nations.

The classical nation-state system which emerged out of the European cultural complex had many distinctive qualities that Lucian Pye believes can no longer be realized today.¹ In that system all the member states shared a relatively common level of technology; so while one might be "larger" or more "powerful" than another, the question of whether one was "superior" and the other "inferior" was neither appropriate nor frequently raised. Above all, Pye states, the classical nation-state system was premised upon certain assumptions about the nature of a "state" and about the characteristics of "sovereignty." Specifically, it was assumed that the ultimate test of sovereignty was the ability of a government to commit the society over which it claimed to rule to courses of action of indefinitely long-time duration.² To have sovereignty was to be able to make

¹Lucian W. Pye, Aspects of Political Development (Boston: Little, Brown, 1966), p. 8.

²Ibid., p. 13.

treaties and to insure that they were carried out. The concept of sovereignty in classical international law was thus directly related to the concept of effective action.

Pye asserts that, in the present day setting, it is clear that sovereignty is no longer tied to the capacity for effective action. Sovereignty is seen more often as a universal right.¹

Since the end of World War II, half a billion people have become citizens of newly-independent countries. In these new countries alone, over thirty million people are employed in administering the business of government according to their visions of a modern state, and another one hundred million depend upon government and politics, both civil and military, for their livelihood. Their great objective is to achieve the impressive elements of organization that characterize the modern nation-state. However, their almost universal problem is that they have the form but not the substance of nationhood, which may create international tension.²

The historical irony of this age of nation building is that the overpowering thrust of nationalism forces people to rivet their attention on the nation as the unit of

¹Ibid.

²Lucian W. Pye, Politics, Personality, and Nation Building (New Haven: Yale University Press, 1962), p. 3.

self-expression and to discount the worth of the individual, and yet the task of nation building calls for precisely the opposite orientation of stressing the individual in his social role.¹ A further complication is that, since the diffusion of the world culture (modernization) can weaken and destroy the structure of traditional societies but cannot so easily reconstitute a more modernized society, the consequence of the international impact has more often been chaos and tension rather than a new order. It seems that the destruction of old relationships has proceeded at an increasingly faster rate than the pace of social reconstruction, and thus another widening gap seems to exist.

Nation building requires the emergence of a feeling for predictability in human relationships. The sense of predictability can widen a people's belief in the range of possible eventualities, and it can encourage them to raise their levels of collective ambitions.

At the same time, this sense of predictability can be a reminder that social systems require a degree of social control and self-discipline which places restraints on all participants. Nation building calls for submission to newly imposed controls; and in the context of contemporary history, this requirement may appear to the individual who is unsure of his identity as a "foreign" demand that the self

¹Ibid., p. 5.

be placed under new and alien "controls." The inherent requirements of the modern world--in all the realms of economics, education, urban life, and politics--may to transitional people seem provocative, threatening, and frustrating.¹ As long as there is confusion about essential forms of any evolving world order, there will be confusion about the appropriate standards of performance for an aspiring nation-state.

As stated before, the creation of a world union involves not only the joining together of nation-states and the problems incurred with designating that status, but also the agreement of the nation-states so joined to give up degrees of their sovereignty in order to act as a collective unity.

In the organization of the United Nations, it is the Security Council which, as far as coercive measures are concerned, is empowered to discharge its "primary responsibility for the maintenance of international peace and security," in accordance with the provisions of Chapter VII of the United Nation's Charter.² (To be sure, this maintenance applies only and solely to collective entities, that is, to states.) Any enforcement action by the Security Council requires "an affirmative vote of seven members including the

¹Ibid., p. 293.

²F. B. Schlick, "The Nuremberg Trial and the International Law of the Future," American Journal of International Law, XLII (January, 1947), 772.

concurrent votes of the permanent members."¹ It is obvious that such a decision presupposes agreement among the permanent Members of the Security Council. Lack of agreement among the principal Powers entrusted with the task of taking joint action under appropriate circumstances will mean that "the most important function of the Organization, the function which forms the core of the Charter, cannot be performed."²

It appears that the United Nations was not effectively constituted to act as an international police force. For it to be one, the nations of the world would have had to renounce their sovereign right to decide where their vital interests lay and to command their own armed forces. Furthermore, the veto system in the Security Council prevents any attempt to intervene if one of the great powers considers itself right and the others wrong.

To perceive the United Nations organization as one possessing a peacekeeping function is to confuse a theory with reality: To ascribe to the United Nations the role of arbiter in past conflicts as have developed in Hungary, Czechoslovakia, Greece, Vietnam, the Pakistans, and the Middle East, is pure delusion.

Therefore, inserting the provision against aggressive warfare in the Charter of the United Nations, while a noble

¹Ibid.

²Ibid., p. 773.

ideal, appears to be unenforcable. This is primarily due to a lack of international consensus as to what determines the status and responsibilities of a nation-state member and to the absence of coercive power in the United Nations organization.

Chapter 5

MODERN FORMS OF WARFARE: CONFLICT BETWEEN THE SUPERPOWERS

The authors of the London Agreement had lived through World War II, which was conducted between nation-states. As representatives of victorious nations in that conflict, they created legal precedents that enabled an International Military Tribunal to label the vanquished nations guilty of aggressive warfare. They also witnessed the elevation of the principle of the illegality of aggressive warfare into a Charter that governed a world-wide organization. The outlook for such an organization and the application of the incorporated principle were examined in Chapter 4.

Many changes have developed in the relationships of countries since the London Conference of 1945. No longer is war or conflict primarily waged just between nation-states. Rather, in the recent past and in the near future, warfare may be categorized into two modern forms of armed conflict: a war between the superpowers, where macro-nuclear weapons could be used, and guerrilla wars, involving the modernizing nations.

In the age of nuclear-deterrence strategy, it is expected that concepts and principles would develop between the participants (e.g., the superpowers) that would be reflected by their conduct in international activities. Prior to and immediately following World War II, nation-states

were generally recognized as sovereign units. However, an examination today of actual practice with regard to the observance of sovereignty is wholly different: Small states located within the perimeter of a superpower's sphere of paramount interest may not exercise their sovereignty in a manner inimical to the interest of the superpower.¹ This umbrella position of superpower supremacy by both the Soviet Union and the United States has become known as the Brezhnev Doctrine and the Johnson Doctrine. These two doctrines express parallel assumptions regarding the superpower's conduct within their respective "zones of interest." The principles of the Brezhnev Doctrine are nearly indistinguishable from its counterpart, the Johnson Doctrine.

An examination of the five points of both doctrines indicates their essential sameness. Briefly, the Brezhnev Doctrine's principles are:

(1) A member nation of a regional or ideological community can never be withdrawn or withdraw itself from that community's jurisdiction.

(2) The community may impose behavioral norms on its members in domestic and foreign policy. . . .

(3) Whether a member of the community is fulfilling these normative obligations is not determined by that member alone, but rather by the other members of the community.

(4) If the other members determine that one

¹Thomas M. Franck and Edward Weisband, "The Johnson and Brezhnev Doctrines," Stanford Law Review, XXII (April, 1970), 979.

member is derelict in its duties, they may use force to alter the policies and, if necessary, the government of the delinquent. Such use of force is not aggression but collective self-defense. . . .

(5) Any socioeconomic or political doctrine of system differing from that of the community is ipso facto alien, and its espousal, even by citizens and government of a member of the community, constitutes foreign subversion of and aggression against the community. . . .¹

And, briefly summarized, the Johnson Doctrine states:

(1) A nation belonging to the American bloc cannot escape the jurisdiction of that bloc.

(2) The bloc may impose its norms on member states.

(3) It is the United States or its bloc which determines whether a state has complied with the established norms.

(4) If the members of the bloc determine that a nation is derelict in its duty to abide by the norms established by the bloc, force may be used to secure such compliance; the use of force in such circumstances is not aggression but collective self-defense.

(5) The expansion of an alien communist ideology into the American family will be tolerated only within limits which the family itself sets and which limits it may decide to impose with force on a deviating state in its midst.²

The Brezhnev Doctrine was used to justify the 1956 invasion of Hungary by the Soviet Union and the 1968 liquidation of the Czech humanist-socialist experiment. Similarly, American intervention in the internal affairs of Guatemala (1954) and Cuba (1962), and incursion into the Dominican Republic (1965),

¹Ibid., pp. 986-87. ²Ibid., pp. 999-1004.

reflected the rhetoric set forth in the Johnson Doctrine.

The Brezhnev Doctrine contains a sixth point not found in the Johnson Doctrine. It states that:

(6) The territory of a member state may be invaded by the armies of the other states acting collectively under the treaty of the community in response to a summons by any persons the community designates as loyalist "leaders" of the invaded state, even though these are not recognized as the legal government of that state even by the other members of the community.¹

The use of military invasion did not enter into the United States' coercive attempt to compel adherence to bloc norms in the confrontation with Cuba and Guatemala; however, President Johnson did not show the same restraint during the crisis over the Dominican Republic.

The Johnson and Brezhnev doctrines have no relation whatever to the global legal order proclaimed at Nuremberg or in the Charter of the United Nations. Both the Soviet Union and the United States claim and exercise the right to exclude the system and machinations of the other from their zones of vital interest, and what they decide may be far removed from what the people of the country involved might choose.

It seems clear that despite the oratory about the indivisibility of peace, authority remains in the capitals of the superpowers, and what is left of global collective security is the right of regional allies to agree to go along

¹Ibid., p. 987.

with determinations made in Washington and Moscow.

Much has been made of the "nuclear stalemate" which has come about with the development by the United States and the Soviet Union of thermonuclear offensive and defensive weapons systems. Only two decades ago, this was considered a difficult and delicate engineering feat, but now nuclear weapons have become plentiful. Moreover, there is no secret now about the manufacture of nuclear weapons or even of thermonuclear devices. Given a certain level of technology, any industrialized states will be able to, and have, produced them. During the Cuban Missile crisis of 1962, John F. Kennedy said that we live under the Sword of Damocles of nuclear weapons. Hidden from view and/or carried in submarines and planes, "every schoolboy knows" that these weapons, if used, mean the annihilation of attacker and attacked, and millions of others around the world.¹

Since achievement of apparent detente with the Soviet Union, the probability of war may seem further away than it was in 1962. However, Secretary of State Henry Kissinger recently commented on the non-stability of the international system. He said:

¹William A. Nesbitt and Charles Bloomstein, "Should the Nation-State Give Way to Some Form of World Organization?" Controversial Issues in the Social Studies: A Contemporary Perspective, ed. R. H. Muessig (Washington: National Council for the Social Studies, 1975), p. 262.

I do not want to speculate what the United States would do if it should appear that instead of beginning an era of cooperation we were thrown back to the confrontations which sooner or later will have to be surmounted, because humanity cannot stand the eternal conflicts of those who have the capacity to destroy.¹

Throughout history, humanity has suffered from a shortage of power and has made concerted efforts to develop new sources and special applications of it. It would have seemed unbelievable fifty years ago that there would ever be an excess of power and that man's survival would depend on the ability to use it subtly and with discrimination. Yet, this is precisely the challenge of the nuclear age. Since the end of World War II brought us not peace but an uneasy armistice, we have responded to what can best be described as a flight into technology: devising ever more fearful weapons. The more powerful the weapons, however, the greater becomes the reluctance to use them.

It is natural that an age which has known two world wars should have as its central problem the attainment of peace. It is paradoxical, however, that so much hope should be concentrated on man's most destructive capabilities. We are told that the growth of the thermonuclear stockpiles has created a stalemate which makes war, if not too risky, at least unprofitable. The power of the new weapons technology is said to have brought about a tacit nonaggression treaty:

¹New York Times, October 26, 1973, p. 18, col. 5.

a recognition that war is no longer a conceivable instrument of policy and that, for this reason, international disputes can be settled only by means of diplomacy. And it has been maintained that the peaceful uses of nuclear energy have made irrelevant many of the traditional motivations for wars of aggression because each major power can bring about a tremendous increase in its productive capacity without annexing either foreign territory or foreign labor.

According to Henry A. Kissinger, these assertions fit well with a national psychology which considers peace as the "normal" pattern of relations among states and which has few doubts that reasonable men can settle all differences by honest compromise. So much depends, however, on the correctness of such propositions that they must be subjected to close scrutiny. Kissinger maintains that:

. . . if recourse to force has in fact become impossible, diplomacy too may lose its efficacy. Far from leading to a resolution of tensions, the inability to use force may perpetuate all disputes, however trivial. It may be a strange fulfillment of the hopes for centuries for universal peace that, when finally realized, it should contribute to the demoralization of the international order, and that diplomacy, so long considered the alternative to war, should emerge as its complement.¹

And, he continues:

The motive force behind international settlements has always been a combination of the belief in the advantages of harmony and the fear of the consequences of proving obdurate. A renunciation of

¹Henry A. Kissinger, Nuclear Weapons and Foreign Policy (New York: Harper and Brothers, 1957), p. 4.

force, by eliminating the penalty for intransigence, will therefore place the international order at the mercy of its most ruthless or its most irresponsible member.¹

If a nuclear war were to erupt, all other problems would be meaningless. Obviously, in considering the future of the nation-state, no problem is of greater significance; indeed, the issue of war and peace has been the principal impetus for those who would radically change the nation-state system in favor of some other kind of world structure.

Simply stated, the notion that a just war of defense is fought against an aggressor helps make a moral case and stiffen the military posture. But what the Soviet representative at the London Conference, General Nikitchenko, said of aggression remains true: "Although when people speak of it they know what they mean; but they cannot define it."² It remains undefined and undefinable.

If they had happened immediately following the London Conference, the military invasions of Czechoslovakia and the Dominican Republic might well have been viewed internationally as wars of aggression. But now, due to a regional alignment of the superpowers, the invasions have been

¹Ibid.

²International Conference on Military Trials, London, Report of Robert H. Jackson United States Representative to the International Conference on Military Trials, U. S. Dept. of State Publication 3080 (Washington, D.C.: U. S. Government Printing Office, 1949), p. 328.

acquiesced to, if not condoned, by the other nation-states.

Regionalism today means that:

Collective self-defense permits a superpower to intervene in the internal affairs of its neighbors to prevent the establishment of a regime inspired by an ideology or a regime considered hostile by the superpower.¹

Although the London Conference declared aggressive warfare to be illegal, a superpower cannot commit "aggressive warfare" within its own region. Rather, it is now labeled "collective self-defense." Furthermore, the practice by the superpowers of arbitrarily employing coercive measures against one of their regional members ignores a provision of the United Nations Charter. Article 53 declares: "No enforcement action shall be taken under regional arrangements without the authority of the Security Council."²

¹Franck and Weisband, p. 1011.

²Ibid., p. 998.

Chapter 6

MODERN FORMS OF WARFARE: GUERRILLA WAR

Guerrilla or partisan warfare, the dominant form of hostility since World War II, has been developed and modified for postwar contingencies. It is a form of war well adapted to the nuclear age and its military stalemate, and for centuries has been fought with marked success by small nations against great powers.

Partisan warfare has been a vital weapon in the crusade preached by Communist China against the Western powers on behalf of the poor people of the countryside in their revolt against the rich and decadent Western cities; and in the rhetoric of American Negro militants, it is the war of the revolutionaries of the urban poor against their oppressors. Partisan warfare, with its hit-and-run tactics, has also played an important part in the majority of battles in wars of national liberation. The Israelis used it to help speed the British out of Palestine, and local populations of North Africa and Indochina to drive out the French. In addition, guerrilla warfare was the main weapon of Castro in his Cuban revolution; and Mao Tse-tung, one of its chief prophets, based his campaigns against both Chiang and the Japanese on guerrilla tactics and strategy.

In much of the traditional literature of comparative politics, the assumption is presented that the world is

compartmentalized into a Western and a non-Western segment, and, inevitably, will split into communist and non-communist parts. However, in more recent literature and studies, some political scientists view the world in terms of the political consequences of modernization, stressing the common traditional background of all countries, with no special reference to communism any more than any other particular ideology or movement. It will be in this latter framework that the following discussion will be placed: the consideration of a broad phenomenon, peasant-based guerrilla warfare, led by modernizers as a present-day companion form of armed conflict, along with nuclear warfare. (Modernizers are defined as "persons who have accepted the assumption that industrialization must occur.")¹

Most peasants in underdeveloped countries remain politically passive. Their age-old tradition of nonparticipation in politics beyond the village level tends to keep them quiescent. However, peasant movements do flare up and die down, but more often than not, these are chiefly expressions of resentment against modernization. The inclinations which underlie them aim at a restoration of the traditional peasant society.

Ordinarily, the modernizers look for and receive

¹John Kautsky, The Political Consequences of Modernization (New York: John Wiley, 1972), p. 17.

their mass support primarily in the cities among the newly-created industrial workers. But where modernizers find few or no workers in the cities, or especially when modernizers have failed in their revolutionizing efforts there, they turn to the countryside in their search of mass support.

Modernizers cannot hope to stir the peasantry with their promises of rapid industrialization, which is meaningless to peasants, or probably even with vistas of independence, since peasants generally have little direct contact with colonialism and do not link their own troubles with it. The one major issue around which peasants can be mobilized is that of land reform, a term that now not only has anti-aristocratic implications, but also suggests opposition to the money lender, the merchant, and the commercial landlord.¹ Even promises of land reform are by no means always successful in stirring the peasantry out of its political passivity. Still, in a few countries like China, Algeria, Cuba, and Vietnam, modernizers have been able to mobilize peasant support to make their revolution. Sometimes, as in China and Russia, the support has been in great numbers and, conversely, sometimes the support has involved only a few peasants (or plantation workers), as in Cuba. Land reform has generally been a key issue in these efforts, but where peasants suffered directly from colonialism or foreign occupation, as they did in China under the Japanese, in Algeria where the

¹Ibid., p. 121.

large landlords were French, on American-owned plantations in Cuba, and, perhaps, in Israeli-occupied Arab territories, they could also be mobilized by appeals for independence and what has come to be known as wars of national liberation.

While urban (specifically, worker) support can be used by modernizers to bring about peaceful change, mass peasant support is employed primarily in the form of warfare.¹ Unlike workers, peasants cannot effectively strike or demonstrate in city streets. In societies where numbers do not count, where there are no elections and no mass interest group organizations, the only effective form of political participation open to the peasant beyond the village level is violence.

The involvement of peasants in the movement of the modernizers, then, tends to result in warfare, and the peculiar form of peasant warfare is guerrilla warfare.² The manpower is provided by the peasantry, made available by the underemployment in villages subject to the impact of some modernization. The peasants' subsistence economy simplifies the problem of supplying the guerrillas. The poor systems of communications prevailing in rural areas put modern military forces at a disadvantage as against the guerrillas and make it difficult for the former to keep open the supply lines of the cities.

¹Ibid., p. 122.

²Ibid.

It appears, then, that once peasants have been mobilized and organized by modernizers to carry on guerrilla warfare, they cannot be defeated militarily.¹ So-called civic action efforts by the government to win over the peasantry, for example, by providing schools or health care for the villagers, are likely to fall short of success. Peasants may or may not appreciate these, but in any case, what they want far more is land reform.

The victories of modernizers leading guerrilla armies have resulted generally from the inability or unwillingness of aristocratic and colonial governments to keep fighting an extremely persistent enemy. With two undefeatable forces facing each other, the peasants are likely to win, perhaps simply because they have no place to withdraw to for they are fighting at home.² Foreign colonial forces do have the alternative of withdrawal available to them, and so do at least the top elements of the native aristocracy and their representatives. Once modernizers have successfully initiated guerrilla warfare, they will probably eventually march to victory at the heads of their peasant armies.

Thus far in this discussion, an attempt has been made to look at guerrilla warfare as a generalized phenomena, devoid of any particular ideology or symbols. It may be of value, however, to consider briefly the uniqueness of

¹Ibid., p. 124.

²Ibid.

communism, for it does have specific features. These features go back to the communists' Marxian symbols, which once distinguished them more sharply than they do now from movements of noncommunist modernizers.¹

Because of their Marxian heritage, communist parties are more inclined than other movements of modernizers to stress the class divisions of societies, and they have, in fact, like all of these movements, sought support from members of all classes. The problem of intellectuals predominating in parties wedded to the Marxian symbols of proletarianism was resolved verbally from Lenin's time on by the claim that these intellectuals represented proletarian class consciousness and thus no matter what policies they pursued were by definition proletarian. John Kautsky goes on further to state that:

. . . beginning in the late 1940s--and in the case of Mao, with his bloc of four classes, even a few years earlier--communists have been appealing not only to intellectuals as well as the "exploited masses" of the workers, the peasants, and the "petty bourgeoisies". . . , but also, quite explicitly, to the bourgeoisie and even to some of the aristocracy. They could do so by replacing capitalism, the enemy of Marx's proletariat in industrial societies, with imperialism or colonialism, the enemy of the modernizers' movements, and, thereby, in effect giving up the proletarian class struggle and revolution.²

Whether Kautsky's conclusion about the change in the communists' perception of the classes they represent and the

¹Ibid., p. 249.

²Ibid., p. 243.

enemies they fight is valid or not is left open to question. It is clear, however, that the theme heard in the public expression of communist rhetoric would not parallel his conclusion.

Lenin called colonialism an absolute evil, a view shared by most African and Asian countries, and communist doctrine in both China and the Soviet Union holds that any state possessing colonies is already convicted of criminality and aggression. Subject peoples, according to the communists, have a right to take armed action to redress old crimes committed against them, as well as to undertake reprisals, and to use any means at their disposal to recover their independence.¹ Every war of national liberation is, therefore, a legitimate response to the built-in provocation of an existing colonial power.

According to current communist thought, guerrilla warfare is part of the worldwide struggle against capitalism and imperialism, that is, against the imperialism of the Western powers or, as one observer has remarked, against imperialism that crosses water. (This, of course, also refers back to the concept of regionalism discussed in Chapter 5.) Imperialism by way of land routes, if conducted as in Hungary and Czechoslovakia on behalf of the socialist

¹Eugene Davidson, The Nuremberg Fallacy (New York: Macmillan, 1973), p. 18.

order of peaceloving nations, is, of course, legitimate in the communist view. (Again, the Johnson Doctrine would proclaim the same legitimacy regarding the Western Hemisphere.) Khrushchev wrote:

The Socialist countries and the Communist parties all over the world will continue to aid and support the peoples who are waging an armed struggle against capitalism. Far from contradicting the principle of peaceful coexistence, this is an affirmation of that concept since the issue at stake . . . is the right of all people to order their lives as they see fit, to be masters in their own house.¹

Also, from the communist point of view,

. . . the struggle of people against reactionary regimes cannot be destroyed by international agreement. For this struggle to cease, the causes eliciting it must be eliminated, i.e., capitalism must be liquidated.²

By definition, no war resorted to by a socialist state constitutes an aggression, and no war fought by a capitalist state can be anything but imperialistic. A socialist war is always a just war, and those who fight on the other side are criminals. In the communist construal, the North Vietnamese, for example, can legitimately deny captured American airmen treatment as prisoners of war.

The communists believe that capitalism is aggression

¹George Ginsburgs, "Wars of National Liberation and the Modern Law of Nations--The Soviet Thesis," Law and Contemporary Problems, XXIX (Autumn 1964), 939.

²Robert D. Crane, "Basic Principles in Soviet Space Law," Law and Contemporary Problems, XXIX (Autumn 1964), 944.

and exploitation, and the struggle against it is justified wherever and whenever it occurs. The Havana Conference of January, 1966, called on the peoples of all countries to support national liberation movements and to undertake subversive action to overturn the governments of a number of members of the Organization of American States.¹ With the United Nations now dominated numerically by the Afro-Asian bloc, plus the representatives of the communist bloc, this is also the view of the United Nations. In its Declaration of January, 1960, "On Granting Independence to Colonial Peoples," the United Nations Assembly declared that every nation has the right to self-determination and that:

The subjugation of peoples is contrary to the Charter and World Peace. . . the inadequacy of political or social or educational preparation should never serve as a pretext to delay independence. All armed efforts against such attempts must cease.²

This doctrine applies to all the emerging nations, as well as to countries with native populations that are not in power.

To generalize at this point, guerrilla warfare as an alternative or companion to nuclear warfare is a reality in our time. Furthermore, it has been legitimized by the United Nations, now and in the future, and national

¹Davidson, p. 19.

²Ginsburgs, pp. 940-41.

independence achieved by such a process must be recognized.

The problem, then, is this: How can the principles instituted at the 1945 London Conference that made illegal the waging of aggressive war and the resulting crimes against humanity be applied to guerrilla warfare?

It is nearly impossible today to brand a state guilty of waging aggressive warfare if the state maintains its action is for the purpose of self-determination. The charge that crimes against humanity were committed as a result of the waging of war becomes highly irrelevant. Guerrilla wars have never been fought according to conventions, for by their nature they involve the use of mass terror. Guerrilla war in the eighteenth and nineteenth centuries presented the same dilemma as it does in its contemporary forms, and the impulse to meet savagery on its own terms was as powerful then as it is now.

Chapter 7

IMPLICATIONS OF THE LAW CONTAINED IN THE LONDON CHARTER

The process of political integration and change has been and is a continuing world-wide phenomenon. At the London Conference, an unstated philosophy behind the attempt to outlaw war was to freeze the status quo, thereby denying the existence of world-wide political change.¹

Radhabinod Pal of India, a member of the International Law Association, was one of the eleven justices at the 1946 Tokyo trials for Japanese war criminals. In his dissenting opinion of the Tokyo Tribunal's judgment, he vehemently objected to the Tribunal's assumption of the status quo. Although Pal was not a participant in the London Conference or the Nuremberg trials, his comments are applicable to them. Pal wrote:

I am not sure if it is possible to create "peace" once for all, and if there can be status quo which is to be eternal. At any rate in the present state of international relations such a static idea of peace is absolutely untenable. Certainly dominated nations of the present day status quo cannot be made to submit to eternal domination only in the name of peace. International law must be prepared to face the problem of bringing within juridical

¹The policy of the status quo aims at the maintenance of the distribution of power as it exists at a particular moment in history. In this discussion the point of reference is the period immediately following World War II. This usage differs from Morgenthau's analysis of status quo which implies status quo ante bellum /Hans Morgenthau, Politics Among Nations (New York: Knopf, 1967), p. 32/.

limits the politico-historical evolution of mankind which up to now has been accomplished chiefly through war. War and other methods of self-help by force can be effectively excluded only when this problem is solved, and it is only then that we can think of introducing criminal responsibility for efforts at adjustment by means other than peaceful.¹

It was impossible to outlaw war without considering the merits of freezing the status quo, and yet, at London and Tokyo no one proposed taking that step.

Emphasizing the reality of world-wide change, Henry Kissinger labels the period since World War II a revolutionary period. He sees this period as a particular problem because:

. . . the distinguishing feature of revolution is the priority it gives to change over the requirement of harmony. Contemporary international relations would therefore be difficult at best, but they take on a special urgency because never have so many different revolutions occurred simultaneously.²

On the political plane, the postwar period has seen the emergence into nationhood of a large number of peoples hitherto under colonial rule. To integrate so many new states into the international community would not be a simple matter at any time; it has become increasingly formidable because many of the newly-independent states continue to inject into their policies the revolutionary fervor that gained

¹Richard H. Minear, Victors' Justice (Princeton: Princeton University Press, 1971), p. 60.

²Henry A. Kissinger, Nuclear Weapons and Foreign Policy (New York: Harper and Brothers, 1957), p. 5.

them independence.

On the ideological plane, the contemporary ferment is fed by the rapidity with which ideas can be communicated and by the inherent impossibility of fulfilling the expectations aroused by revolutionary slogans. On the economic and social plane, millions are rebelling against standards of living as well as against social and racial barriers which have remained unchanged for centuries.

War, regardless of its form, is indeed reprehensible and primitive, and may threaten universal catastrophe. But it cannot be conjured away by calling it the crime of an individual, or individuals, to be suppressed by a world community of "peace-loving" nations, when to responsible leaders it always appears as a final recourse against intolerable injury or national disaster. (Most peace treaties are concluded under duress. But duress does not make a treaty void or voidable in international law.) Under present or past world conditions, the attempt to adopt a universal status quo posture is highly unrealistic.

The assumption that the world society is one characterized by change, rather than by stability, severely limits the principle and application of the illegality of aggressive warfare. This assumption and ensuing limitation suggests the question of whether there are alternatives to the present international system of nation-states, and, if so, what institutional arrangements are not only desirable

but feasible. Four possible alternatives will be briefly examined; (1) all-purpose world government, (2) limited world government, (3) regional institutions, and (4) functional government. (None of these forms are absolute; variations of each plan could also be introduced.)

In an all-purpose world government, sovereign power would be transferred from the nation-states to a larger or higher unit. In addition to its function of providing security, the world government would also be responsible for global general welfare--guaranteeing protection against the worst natural and social calamities, promoting economic development, and providing for health and education. Clearly, an all-purpose world government could be a bureaucratic maze, and financing would be extremely difficult, if not impossible. Furthermore, a problem might develop in resolving how the monopoly of power in the central authority would be determined and exercised. Another potential problem might be that the dominant group--whether the most affluent or least affluent, or simply the group larger in number than the other--could become a tyranny against the rest.

Norman Cousins argues that we must establish a central authority "which takes away from nations, summarily and completely, not only the machinery of battle that can wage war, but the machinery of decision that can start a

war."¹

Others seemingly no less desirous of peace and no less aware of the perils of the present international system of nation-states disagree. Questioning the value of a single world system Harvard's Karl Deutsch says:

A world government that had all control in one centralized place for decision making about the enforcement of law would have control over the law, much as the Roman Legions had control over the Roman Empire. Once such a government controlled all laws, it would be able to control all aspects of life.²

Maurice Strong, principal organizer of the Stockholm Conference of 1972 and a leader of the United Nations Environment Program, doubts that one-world government will become a reality. Recently, he wrote:

The development of new international machinery to deal with the complex problems of an increasingly interdependent technological civilization will not come about through the surrender of sovereignty by national governments but only by the purposeful exercise of the sovereignty. . . . The world is not likely to unite behind a common ideology or a super-government.³

A second alternative to the present system of

¹William A. Nesbitt and Charles Bloomstein, "Should the Nation-State Give Way to Some Form of World Organization?" Controversial Issues in the Social Studies: A Contemporary Perspective, ed. R. H. Muessig (Washington: National Council for the Social Studies, 1975), p. 262.

²Ibid.

³Maurice Strong, "One Year After Stockholm: An Ecological Approach to Management," Foreign Affairs, LI (July, 1973), 706.

sovereign states is limited world government, a situation where the nation-states maintain their identity and structures but voluntarily surrender certain limited and specified powers to an over-arching body, i.e., world federalism. The key question here would be: Would nation-states ever relinquish their armed forces to a central authority, when national decision-makers associate their role and status with military power? Considering our present United Nations and the small degree of coercive power afforded to it by the member-nations, coupled with the difficulty of defining a nation-state and its responsibilities internationally, the answer is in the negative.

It has been projected that regional organizations, such as the European Common Market, could become a stepping stone to world organization. However, there is doubt that the creation of a strong regional organization among once competing nation-states will move the world closer to peace. Such a unit may become simply another power bloc, competing with existing power blocs and tending to become exclusive of non-members in the competition for world resources and markets.

A different type of regional alignment based on nuclear strength (discussed in Chapter 5) is also evident today. If sanctions are not applied, such regional alliances function collectively only when they are perceived to serve the defense of the individual state, as in the North

Atlantic Treaty Organization. However, collective action may not develop if the regional group members do not perceive their state to be imperiled, as evidenced by the action of the members of the Southeast Asia Collective Defence Treaty Organization in the Vietnam conflict.¹ These regional groupings are not much different from the former system of alliances prevailing prior to World Wars I and II, constituting again a rough balance of power. These regional alignments may, over time, encourage conflict rather than promote peace.

A fourth alternative to the current international system of nation-states is functionalism.² The functional approach takes the position that viable and legitimate transnational institutions result from a process during which limited and specific tasks are assigned to limited and specific organizations to meet particular problems. Maurice Strong asserts:

It is only when nations find themselves incapable of exercising their sovereignty effectively or advantageously on a unilateral basis that they will agree--reluctantly--to exercise it collectively by agreement with other nations.³

¹Eugene Davidson, The Nuremberg Fallacy (New York: Macmillan, 1973), p. 292.

²Inis L. Claude, Swords Into Plowshares (New York: Random House, 1971), p. 378.

³Strong, p. 706.

The functional approach would avoid forcing a choice of alternatives, ranging from the continuation of the present nation-state system to the potential creation of world government.

Rather, it would ask what needs to be done to solve problems not amenable to national solutions, since the problems do not respect national boundaries. Energy shortages, resource depletion, over-population, food shortages, and environmental deterioration all affect each other; and all in their combined impact have potentially dangerous implications for keeping conflict within tolerable bounds as we face the twenty-first century. The key concept is interdependence. As our biosphere is a single environmental system, so are we part of a world-wide economic system. Present conflicts may be worsened by competition for new sources of raw materials--the seabed tomorrow, the moon in due course.

The nation-state is not structured to cope with these newly-perceived difficulties, and may give way to an increasingly complex system of international cooperative groups such as the specialized agencies of the United Nations; non-governmental groups, e.g., the World Federation of Trade Unions and the International Chamber of Commerce; and possibly, interchange between or integration of world-wide business corporations.¹

¹Claude, p. 382.

Throughout this chapter, the consideration of various alternatives to present-day international governmental organizations was primarily motivated to ascertain if there is a potential form of world-wide alignment that could effect the principle of the illegality of aggressive warfare as set forth at the London Conference. Over time it may develop that the overriding imperative to deal with these global social, economic and environmental problems may provide the key to reordering the nation-state system and, as a consequence rather than a declared goal, end aggressive warfare.

There is a choice to be made between the status quo--in which the strongest nation-states retain the sovereign power to wreak annihilating damage upon each other and seriously disrupt life elsewhere; in which any disorder of instability in the Third World threatens to involve the nuclear powers; in which an interdependent world faces an array of interrelated problems, including competition for scarce resources--and some alternative.

But while the imperatives of world society and the functional needs of states require a new definition of sovereignty, there is no denying that the nation-state is still the actor on the world scene. Governments remain in control of what has been a fundamental aspect of sovereignty: the power to make peace and war.

Therefore, from a pragmatic stance an understanding of why nation-states and, in particular, aspiring nation-states

behave as they do, rather than how they are expected to perform, is essential. Since the mid-1950s, this fundamental change of approach has been reflected in the scope and direction of comparative political analysis. As late as 1944, leading scholars of political science referred to comparative government as "a discipline in a status of suspended animation."¹ The roots of reaction to formal-legalism in American political science can be traced back to the 1920s and 1930s and to the "pioneering writings of scholars such as George E. G. Catlin, Charles R. Merriam, and Harold Lasswell."² Today, rather than emphasizing the traditional approach to the study of comparative politics, political scholars have begun to focus seriously and systematically upon the problems of political development and social change. Furthermore, the methodologies, theoretical frameworks, and conceptual apparatus pertinent to comparative analysis are now neither monopolized by nor concentrated within the discipline of political science. In this spirit, "leading scholars such as David Singer and David Easton have already called for the establishment of a 'Federation of Social Scientists.'"³

¹J. A. Bill and R. Hardgrave, Jr., Comparative Politics: The Quest for Theory (Columbus: Merrill, 1973), p. 10.

²Ibid., p. 12.

³Ibid., p. 18.

Today we have available many studies--cross-national comparisons or analyses of particular political systems--that may increase our understanding and prediction of the political process. Works such as David Easton's A Framework for Political Analysis (1965), Lucian Pye's Aspects of Political Development (1966), and Robert Dahl's Politics, Economics and Welfare (1953), have given us insight into areas such as the persistence of political systems over long periods of time, the characteristics of political culture and development in non-Western societies, and the realization by calculation and control of rational social action.

One common characteristic shared by these and other political scientists is that theories have not developed from their analytical works. The ability to control remains a potential goal, but the expanding research in comparative politics may enable us to explain and predict events that may, as a result, aid in reducing international conflict.

To summarize, the London Conference was held following World War II to establish the law and procedures for the Nuremberg war-crime trials. The Conference was comprised of representatives of the four major victorious nations: France, Great Britain, the Soviet Union and the United States. A major difficulty encountered in establishing the procedures was combining the divergencies of the Continental and Anglo-American systems of law. A second and equally major problem

that arose was one of substantive process: Was aggressive war viewed internationally as a crime? Those that affirmed that it was proclaimed that the Conference was only codifying what was generally accepted as a principle of international law. Others, however, viewed the establishment at London of the illegality of aggressive warfare as ex post facto legislation.

Once the principle of outlawing aggressive war was established, the question arose: How will this principle be put into effect? Consideration has been given to the situation that today world organization is based on the nation-state concept, with weak coercive powers awarded to the United Nations. The lack of international consensus as to what constitutes a nation-state and its responsibilities to the central organization, coupled with the lack of coercive power given to the United Nations, make difficult, if not impossible, the enforcement of the provision against aggressive warfare. Tied closely to this problem of effecting the outlawing of aggressive war within a nation-state structure are the current forms of warfare; nuclear warfare and guerrilla warfare. The nuclear stalemate has resulted in a regional alignment between the Soviet Union and the United States as expressed in the Brezhnev and Johnson Doctrines. The rationale of these doctrines makes an act of aggression by either of the superpowers within their respective zones of interest impossible to curb, since small states may not

exercise their sovereignty in a manner inimical to the interest of the superpower. Guerrilla warfare is a type of warfare commonly used by emerging nations to achieve their independence. Regardless of the savagery of the conflict, this form of warfare has been legitimized by the United Nations if the participants claim their goal is national liberation. Therefore, today the principle of outlawing warfare is not applied against superpowers acting within their spheres of paramount interest or groups engaging in guerrilla warfare as a means to achieving self-determination.

Lastly, an examination has been made of alternatives to the present international system of nation-states as potential vehicles through which the principle of outlawing aggressive warfare could be enforced.

In the final consideration of the London Conference and the resulting Charter, two major questions will be considered: From a narrow perspective, did the Conference act within the accepted norms of international law in their procedural and substantive decisions; and, in a broader perspective, is collective security as now constituted able to enforce the principle of outlawing aggressive warfare?

The amalgamation of two systems of law, The Continental and the Anglo-American, makes it difficult to judge, from a necessarily biased viewpoint, the "fairness" of the prescribed rules of the trial procedure. The innovative establishment of an International Military Tribunal, in the

absence of existing international precedents, also makes an objective assessment difficult. However, the acquiescence to relaxing the traditional (i.e., traditional to the Anglo-American system) rules of evidence; the absence of a non-partial jury for consideration of the verdicts; the establishment of a panel of four judges, none of whom could be considered "impartial" in any rational understanding of the term; and, above all, an unprecedented "international" trial of the vanquished by the victors, would lead this author to have serious doubts that under these conditions accused persons could receive due process of law.

A decision made at the London Conference was that conspiring to or waging aggressive war was an international crime and that the conferees were only codifying a principle that was and had been generally accepted internationally.

Many scholars of international law contend against this rationalization. Their position is that in fact no such consensus existed, and, in effect, ex post facto legislation was created. This author would tend to agree with their position.

If, indeed, conspiring to or waging aggressive warfare is a principle of international law, the question remains: Can this principle be effectively applied today?

To assess the answer to this question, an overall judgment of contemporary international realities must be made. Consideration must be given to the facts that: the

United Nations has been awarded weak coercive powers; the superpowers are regionally aligned and have established the practice of "collective self-defense" within their respective regions; any consensual definition of a nation-state is lacking, especially with regard to emerging nations; and, the nation-states or aspiring nation-states have the universally confirmed right to engage in wars of self-determination.

The conclusion of this author is that, based on the above considerations, the principle of outlawing aggressive warfare developed at the London Conference cannot be effectively applied today.

EPILOGUE

On April 12, 1974, a definition of aggression, a matter first taken up by the General Assembly of the United Nations twenty-four years ago, was approved by consensus at the end of a five-week session of the Special Committee on the Question of Defining Aggression.¹ This latest effort to define aggression, the result of seven years of work by a thirty-five member body, was accepted and approved in September, 1974, by the United Nations General Assembly.²

Since the first effort to define aggression in the Preparatory Commission for a Disarmament Conference in 1927, there have been many attempts at definition and few results. Notable milestones in this effort are the Pacts of 1933 executed by the U.S.S.R. with neighbors to define aggression, the provisions of the 1945 Charter for the Nuremberg trials, a discussion in the International Law Commission in 1951, and the deliberations of earlier "Special Committees" in 1953, 1956 and 1959.³

In an explanatory note attached to the draft definition, the sponsors declared that the term "'State' is used

¹"Question of Defining Aggression," United Nations Monthly Chronicle, XI, No. 5 (1974), 86.

²Ibid.

³John N. Hazard, "Why Try Again to Define Aggression," American Journal of International Law, LXII (July, 1968), 702.

without prejudice to questions of recognition or to whether a State is a Member of the United Nations," and that the expression "'any weapons' is used without making a distinction between conventional weapons, weapons of mass destruction and any other kind of weapon."¹

In Article 3 of the definition any of the following acts would qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, marine and air fleets of another State;

(e) The use of armed forces of one State, which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

¹"Question of Defining Aggression," op. cit., pp. 86-87.

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.¹

In Article 4 it was further stated that:

The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provision of the Charter.²

At the London Conference aggressive warfare was outlawed and thirty years later the United Nations defined aggression. However, the period following World War II has been one filled with armed conflicts, police actions and wars of national liberation. International legislation--that is, the process of establishing rules by consent--can only be effected if the essential interests of the nation-states coincide. In the opinion of this author no such harmony of interest exists and, furthermore, the United Nations as now constituted lacks the power to enforce its prohibition against aggressive warfare, however it is defined.

¹Ibid., p. 87.

²Ibid.

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